IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1977

No. 78-628

JOHN HUTTER
Petitioner

vs.

LAKE VIEW TRUST and SAVINGS BANK, et al
Respondents

Petition for a Writ of Certiorari to the Appellate Court of Illinois ~~and the Supreme Court of Illinois.~~

John A. Hutter
Attorney pro se for Petitioner
Rt. 1
Sturgeon Bay, WI 54235
414/743-5774

and

3526 N. Marshfield Ave.
Chicago, IL 60657

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JOHN HUTTER, Petitioner

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Respondents

Petiton for a Writ of Certiorari to the Appellate Court of Illinois and the Supreme Court of Illinois.

(a) With reference to the question of a preliminary injunction, the Appellate Court of Illinois quotes (Ill. Rev. Stat. 1975 ch. 110A par 307 (a) (1.) Statistical Fab. Corp. v. Huack (1972) 5 Ill. App. 3d 50, 282 N.E. 2d 524) (Hoffman v. City of Evanston (1968) 101 Ill App. 2d 440, 444, 243 N.E. 2d 478, 480; County of DuPage v. Robinette (1966) 77 Ill App 2d 167, 221 N.E. 2d 769; East Side Health District v. Village of Caseyville (1962) 35 Ill App 2d 443 183 N.E. 2d 30) - and many other cases to the effect that Hutter's loss of homestead building would not do "irreparable" harm to him.

The court further quotes "Gerber v. First National Bank (1975) 30 Ill App 3d 776, 780 332 N.E. 2d 615, 618, "grants a right to dismiss, thus fostering orderly procedure and relieving litigants and courts of unnecessary burdens associated with multiple actions". Here the court cites a case which should be in favor of Hutter's claim of multiplicity of suits.

(b) This court should take jurisdiction because due process is ignored. Hutter's right to protect his homestead pending juries verdict and his right not to be subject to multiple suits on the same subject matter was denied.

(i) Judgement in the Appellate Court of Illinois Fifth Division, was entered November 4, 1977.
Hutter's petition for leave to appeal to the Supreme Court of Illinois was denied March 30, 1978.

(ii) No extension of hearing.

(iii) The decision of the courts of Illinois deny Hutter his rights of due process and protection under Amendment 14 of the Constitution of the United States.

(c) The questions presented for review are:

1. Did the lower courts err and deny due process when they refused in equity, to protect the homestead of plaintiff pending outcome of the complaint?

2. Did the lower courts err and deny due process when they permitted defendant bank to start and file a suit in another court against plaintiff involving the same subject matter, instead of filing a cross complaint, thus forcing plaintiff to file and pay for another jury demand and respond to a multiplicity of suits?

(d) The constitutional provision involved here is due process under Amendment 14 of the Constitution of the United States.

(e) Plaintiff Hutter as a boy of fourteen, over sixty five years ago, opened his first savings account in the defendants bank and had a close relationship and relied upon the bank Lake View, with implicit confidence.

Hutter is a customer of the Bank of Sturgeon Bay, Wis. That bank bought bonds for Hutter and made collerateral loans thereon.

Lake View convinced Hutter to let them pay off the collerateral loan to the Sturgeon Bay bank and transfer it to Lake View. They said they would loan Hutter considerably more money so he could buy other corporate bonds and the interest they would charge him would be lower than the Bank of Sturgeon Bay so that the interest earned on the bonds would be greater than that charged by Lake View. They also made a loan on Hutter's building unknown to Hutter. The ownership of the bank changed and so did their policy to Hutter.

The bank increased interest rates to 11% which was 4% above what Hutter received on his bonds. They promised the rate would be reduced just around the corner.

Finally Hutter was told the rate would not be reduced. Hutter could have paid the bank off and transfered the loan back to the Sturgeon Bay bank. He instead was persuaded to let the bank sell the securities. Lake View said the proceeds would have over some $20,000.00 in bonds and the collateral loan on Hutter's homestead would be placed on a low monthly payment basis and the interest rate would be less than 9%.

Hutter was shocked when he was told he would receive no bonds and would have to pay off the loan on the building in about sixty days. He saw no solution except to go to a chancery court and ask for justice.

The entire record supports above stated facts:

(f-g) Hutter believes that a just solution to this matter would be to dismiss the action filed by Lake View in the law division and require the bank to file a cross complaint in the chancery action and reimburse Hutter for any costs sustained, and refrain from trying to sell Hutter's homestead pending outcome of this action.

Courts generally seem to favor large law firms, attorneys who appear before them over the years and friends and former law partners. The stray individual attorney is scorned.

The multiple suit by Lake View was intended to harass Hutter who must drive 500 miles to make each court appearance. At 79 this is very difficult.

Hutter prays that the court will grant the Writ of Certiorari and see that he receives justice.

Respectfully submitted,

John A. Hutter,
Attorney at Law, pro se

APPENDIX

Fifth Division
November 4, 1977

Nos. 76-1472)
76-1683)

JOHN HUTTER, Plaintiff-Appellant,	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY
v.	)	
LAKE VIEW TRUST AND SAVINGS BANK and MERRILL, LYNCH, PIERCE, FENNER & SMITH, INC., Defendants-Appellees	)	HONORABLE NATHAN M. COHEN PRESIDING

Mr. PRESIDING JUSTICE SULLIVAN delivered the opinion of the court:

In these consolidated appeals, plaintiff seeks reversal of orders entered in two separate trial court actions.

In the first (76-1472), John Hutter (Hutter) petitioned on June 6, 1976, against defendants Lake View Trust and Savings Bank (the Bank) and Merrill Lynch Pierce Fenner & Smith, Inc. (Merrill Lynch) asking, in addition to an accounting and damages, that both defendants be enjoined from selling or otherwise disposing of certain securities and accumulated interest which had been pledged as collateral for loans, and that the Bank also be enjoined from taking any action in regard to a certain land trust until the ultimate disposition of the case. The Bank filed a

motion to dismiss and, on September 15, 1976, the trial court struck that portion of the petition which sought an injunction for failure to allege the lack of an adequate remedy at law and transferred the cause to the law division. On appeal from that order, Hutter contends that the trial court denied his right to due process of law by striking his request for equitable relief.

In the second case (76-1683), the Bank brought suit on July 30, 1976, against Hutter, seeking payment of a promissory note which it alleged was past due. Hutter answered and filed a cross-complaint against the Bank only, which contains substantially the same allegations as his petition in 76-1472. Both parties then filed motions to dismiss. On November 5, 1976, an order was entered denying Hutter's motion to dismiss the Bank's action, and a separate order granted the Bank's motion to dismiss on the basis that "another action is pending between the same parties for the same cause", the other being the suit files on June 6, 1976. On appeal from these orders he contends that he was deprived of "his day in court".

OPINION

While Hutter has continually maintained in 76-1472 that the trial court denied him due process of law by striking his petition for an injunction to preserve the status quo, for the first time in his

reply brief he identifies the basis of the due process contention which he claims renders his remedy at law inadequate. His position is that actions taken by the Bank regarding his beneficial interest in a certain land trust will deprive him of his homestead. We cannot agree.

The granting or denial of an injunction which is interlocutory in nature is an appealable order. (Ill. Re. Stat.1975, ch. 110A, par. 307(a) (1); Statistical Tabulating Corp. v. Hauck (1972), 5 Ill. App.3d 50, 282 N.E.2d 524.)

> "A preliminary injunction is an extraordinary remedy which usually will issue only when it appears that irreparable harm might be done in the event that the status quo is not maintained pending the dispostion of a lawsuit. It is generally employed only in matters of great urgency, and then only with the utmost care and caution. (Citations.)" (Hoffman v. City of Evanston (1968), 101 Ill. App.2d 440, 444, 243 N.E. 2d 478, 480.)

To establish a right to an injunction, facts must be alleged positively with certainty and precision as opposed to mere opinion and conclusion, and such allegations must show that irreparable harm will result should the status quo be impaired prior to the termination of the litigation. (County of DuPage v. Robinette (1966),

77 Ill.App.2d 167, 221 N.E. 2d 769; East Side Health District v. Village of Caseyville (1962), 35 Ill.App.2d 443, 183 N.E. 2d 20.) Irreparable harm is established where the remedy at law is inadequate in that monetary damages either will not adequately compensate plaintiff or cannot be measured by any pecuniary standard. (Simpkins v. Maras (1958), 17 Ill.App.2d 238, 149 N.E.2d 430.) In granting or denying a preliminary injunction, the trial court possesses a broad discretionary power and, absent abuse, the exercise of such discretion will not be disturbed by a court of review. People v. Progressive General Insurance Co. (1967), 84 Ill.App. 2d 109, 228 N.E.2d 146; Gifford v. Rich (1965), 58 Ill.App.2d 405, 208 N.E.2d 47.

A beneficial interest in a land trust is personal property and, to determine whether an estate of homestead attaches to such property, detailed facts pertaining to the creation of the trust must be alleged. (See Sterling Savings & Loan Association v. Schultz (1966), 71 Ill.App 2d 53.) One claiming the benefits of homestead (Ill.Rev. Stat. 1975, ch. 52, par.1, et seq.) must also establish that he meets the statutory requirements. First National Bank & Trust Co. v. Sandifer (1970), 121 Ill.App.2d 479, 258 N.E.2d 35.

Here, to the extent that the trial court's order striking Hutter's petition for equitable relief denied him an injunction to preserve the status quo until

the ultimate disposition of the litigation, it is an appealable order. (Ill. Rev. Stat. 1975, ch. 110A, par. 307(a) (1).) In his petition, Hutter frequently stated opinions and conclusions concerning vague understandings, promises, and inducements without stating when, where and under what circumstances these transactions or interactions occurred. Moreover, he failed to state even in a conclusionary manner that damages would not adequately compensate him should his case be found to be meritorious. The complaint is devoid of factual allegations which show either the manner in which he would be harmed should the court fail to restrain (until the ultimate dispostion of the case), the sale of securities, or the unspecified action which the Bank may take in regard to his beneficial interest in the land trust. Should the securities be transferred and the ultimate resolution be in Hutter's favor, the loss suffered could be fully compensated by damages which could be computed with reasonable certainty. (Gifford v. Rich.) Also, as the beneficial interest is personalty (Sterling Savings & Loan Association v. Schultz,) and because Hutter has not made sufficient allegations showing an interest which amounts to an estate of homestead (First National Bank and Trust Co. v. Sandifer), any loss suffered by Hutter in the alteration of the status quo could also be adequately compensated by damages. Thus, we cannot say that the trial court abused its discretion in striking Hutter's petition for equitable

relief.

Hutter next contends, in 76-1683, that the trial court erred in denying his motion to dismiss the Bank's complaint. We decline to reach the merits of this issue, as the denial of a motion to strike or dismiss of itself is not a final appealable order. (Cahokia Sportservice, Inc. v. Illinois Liquor Control Commission (1975), 32 Ill. App 3d 801, 336 N.E.2d 276.

Hutter's second contention in 76-1683 is that the trial court deprived him "of his day in court" by improperly granting the Bank's motion to dismiss his cross-complaint. We disagree.

Section 48(1)(c) of the Civil Practice Act. (Ill. Rev. Stat. 1975, ch. 110, par. 48(1)(c)) provides:

> "(1) Defendant may, within time for pleading, file a motion for dismissal of the action or for other appropriate relief upon any of the following ground. If the grounds do not appear on the face of the pleading attacked the motion shall be supported by affidavit:
>
> * * *
>
> (c) That there is another action pending between the same parties for the same cause."

Two actions are "for the same cause" where relief is sought on substantially the same

set of facts. (Skolnick v. Martin (1964), 32 Ill.2d 55, 203 N.E.2d 428, cert. denied (1965), 381 U.S. 926.) Except in rare cases, the trial court's inquiry is limited to the identity of parties and cause, as section 48(1)(c) "grants a right to dismiss, thus fostering orderly procedure and relieving litigants and courts of unnecessary burdens associated with multiple actions." Gerber v. First National Bank (1975), 30 Ill. App.3d 776, 780, 332 N.E. 2d 615, 618.

Here, while Hutter's original action was against Merrill Lynch as well as the Bank, Merrill Lynch answered that it was not really a party to the transactions between Hutter and the Bank, characterizing itself as a mere stakeholder--which is corroborated by the allegations of Hutter's complaint. Moreover, substantially the same set of facts forms the basis for Hutter's petition and cross-complaint (the latter being more factual in nature than the former) and each seeks the same relief, except Hutter in the cross-complaint omitted the request for injunctive relief. Therefore, we cannot say that the trial court erred in granting the Bank's motion to dismiss.

For the reasons stated, the judgement of the circuit court in cause numbers 76-1472 and 76-1683 is affirmed.

Affirmed.

LORENZ and WILSON, JJ., Concur.

March 30, 1978

No. 50256 - John Hutter, petitioner, vs. Lake View Trust and Savings Bank, et al., respondents. Leave to appeal, Appellate Court, First District.

You are hereby notified that the Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

Clell L. Woods
Clerk of the Supreme Court

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-628

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE ILLINOIS SUPREME COURT.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR CERTIORARI

VICTOR L. LEWIS,
ROBERT C. CHRISTENSON,
115 South LaSalle Street,
Chicago, Illinois 60603,
Counsel for Respondent.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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I. THE PETITION FOR CERTIORARI

On October 19, 1978, Respondent, Lake View Trust and Savings Bank ("Lake View") received a Petition for writ of certiorari (the "Petition") filed in the above entitled case by John Hutter ("Hutter"). Hutter's Petition was captioned "October Term, 1977," although it failed to include a docket number, a certificate of filing, or proof of service. On November 1, 1978, Lake View discovered that Hutter's Petition had been filed with this Court and assigned Docket No. 78-628.

II. OPINION BELOW

Hutter's Petition seeks review of the decision of the Illinois Appellate Court, First District, Fifth Division, rendered November 4, 1977, affirming the trial court, and the decision of the Illinois Supreme Court rendered on March 30, 1978, denying Hutter leave to appeal. The appellate opinion is reported at 54 Ill. App. 3d 653, 12 Ill. Dec. 423, 370 N. E. 2d 47 (1977). The denial of leave to appeal by the Illinois Supreme Court (Case No. 50256) was not reported. Copies of both opinions are appended to Hutter's Petition as Appendix pages 1 through 8.

III. ARGUMENT

A. Hutter's Petition Contains No Grounds for Invoking the Jurisdiction of This Court.

1. No Federal Question Was Decided by the Courts Below.

Hutter ostensibly bases his claim for jurisdiction in this Court on an alleged deprivation of "due process" (Pet. p. 2), thereby attempting to bring himself within the ambit of the jurisdictional statute, 28 U. S. C. § 1257 (1978). In pertinent part, this statute provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * *
>
> "(3) By writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

The opinion of the Illinois Appellate Court shows that no federal question was raised or decided in that forum or in the trial court. Hutter maintains he was denied "due process", but the courts below merely ruled that he had failed to plead irreparable injury (Case No. 76-1473; Pet. Appendix p. 5); that he had failed to plead sufficient facts to show a "homestead interest" (Pet. Appendix p. 4); and that he had two actions pending against Lake View for the same cause (Case No. 76-1683; Pet. Appendix pp. 6-7). Each of these holdings was based entirely on state law.

This Court often has stated that appellate jurisdiction fails unless it appears affirmatively from the record that a federal question was either raised in or decided by the state courts. *Cardinale* v. *Louisiana*, 394 U. S. 437, 438 (1969). In *Whitney* v. *California*, 274 U. S. 357, 360 (1927), Mr. Justice Sanford stated:

> "It has long been settled that this court acquires no jurisdiction to review the judgment of a state court of last resort on a writ of error, unless it affirmatively appears on the face of the record that a Federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court."

Even Hutter's claim of due process fails to raise a federal issue. The Illinois Constitution of 1970 contains a due process clause in Article I, Section 2:

> "Section 2. *Due Process and Equal Protection*
>
> "No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws."

Hutter's arguments below do not clarify whether he asserts the mantle of federal or state due process. It is settled law that a petitioner must show that some provision of the federal, as distinguished from the state, constitution was relied upon. *New York Central and Hudson River R. R. Co.* v. *City of New York*, 186 U. S. 269, 273 (1902). Where it is left

uncertain whether the claim is based on a provision of the state constitution, the federal constitution, or both, no basis for review by this Court exists. *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 68 (1928). Indeed, in *Bowe* v. *Scott*, 233 U. S. 658 (1914), this Court dismissed a writ of error for want of jurisdiction after the petitioner had alleged that denial of an injunction would lead to a taking of his property "without due process". Mr. Chief Justice White stated:

> "But it is settled that such an averment, making no reference to the Constitution of the United States, and asserting no express rights thereunder, is solely referable to the state Constitution, which, in this instance, has a due process clause, and affords no basis whatever for invoking the jurisdiction of this court. Miller v. Cornwall R. Co., 168 U.S. 131, 42 L.ed. 409, 18 Sup.Ct.Rep. 34; Harding v. Illinois, 196 U.S. 78, 49 L.ed. 394, 25 Sup.Ct.Rep. 176."

233 U. S. at 665.

Although Hutter's Petition directs itself to the Fourteenth Amendment of the Federal Constitution (Pet. p. 2), it is now too late for him to raise a federal due process issue. Where a constitutional question is raised for the first time in the Supreme Court, it is "necessarily excluded" from consideration. *White River Lumber Co.* v. *Arkansas ex rel. Applegate*, 279 U. S. 692, 700 (1929).

It is submitted that Hutter's Petition should be dismissed because no federal question was raised or decided below.

2. The State Court Proceedings Are Not Sufficiently Final To Be Reviewed by This Court.

To be reviewable by this Court, state court proceedings must be sufficiently final so that further proceedings will not render this Court's ruling superfluous. *Cf. Clark* v. *Kansas City*, 172 U. S. 334, 336-337 (1899). If a decree below leaves the entire case to be disposed of on the merits at some later date, jurisdiction in the Supreme Court is improper. *Moses* v. *Mayor*, 15 Wall. 387 (1873); *Gibbons* v. *Ogden*, 6 Wheat. 448 (1821).

In this case, Hutter's Petition for injunctive relief was denied (Case No. 76-1472), but his case in chief was transferred to another court for hearing on the merits (Pet. Appendix p. 2). And, in No. 76-1683, Hutter's counterclaim was dismissed, but only because Case No. 76-1472 was pending seeking the same relief against Lake View on the same set of facts (Pet. Appendix pp. 6-7). Neither of the cases has yet been heard on the merits, and neither is sufficiently final for this Court to review the issues Hutter raises at this time.

B. The Issues Raised in Hutter's Petition Are Not of Sufficient Substance to Justify Grant of Certiorari.

This Court often has stated that even if jurisdiction is proper, there must be "special and important" considerations which require grant of certiorari. *Rice* v. *Sioux City Memoral Park Cemetery*, 349 U. S. 70, 74 (1955). "Importance" means importance to the public, not importance merely to the persons involved. *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163 (1923). Rule 19 of the Rules of Practice of this Court reiterates this substance requirement:

> "19. Considerations Governing Review on Certiorari
>
> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court. * * *"

Despite these mandates, Hutter's Petition makes no showing of any issue of sufficient import to cause this Court to grant certiorari. To the contrary, the case to date has been decided entirely on the basis of its particular facts: Hutter has not pleaded

facts entitling him to injunctive relief, has not pleaded facts demonstrating a "homestead interest", and has attempted to plead the same facts requesting the same relief against the same defendant in two separate cases. Hutter's facts merely present minor issues of state procedural law which at this early stage of the proceedings have little impact on Hutter, much less on the realm of federal constitutional law. Indeed, the merits of the cases below have not yet been reached nor the issues joined.

It is submitted that Hutter's Petition fails to present issues of sufficient substance or import to require this Court to grant certiorari.

C. Adequate State Grounds Exist to Support the Decision Below Without Reference to Any Federal Issues.

Where adequate state grounds sustain the decision below, this Court will not review the judgment. *Berea College* v. *Kentucky*, 211 U. S. 45, 63 (1908); *Fox Film Corp.* v. *Muller*, 296 U. S. 207, 210 (1935). The opinion of the Illinois Appellate Court clearly reveals that adequate state grounds support that decision. Hutter failed to comply with Illinois' pleading requirements both that he plead irreparable injury in order to entitle him to injunctive relief (Pet. Appendix p. 5) and that he plead adequate facts to show he had a homestead interest in certain of the property involved (Pet. Appendix p. 5). And, Hutter plainly brought himself within the purview of Section 48(1)(c) of the Illinois Civil Practice Act (Ill. Rev. Stat. 1975, ch. 110, ¶ 48(1)(c)) when he attempted to allege two actions against Lake View for the same cause. Transgression of these state requirements was more than sufficient to justify the result below without reference to any federal questions or issues.

IV. CONCLUSION

For the foregoing reasons, Hutter's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

VICTOR L. LEWIS,
ROBERT C. CHRISTENSON,
115 South LaSalle Street,
Chicago, Illinois 60603,
Counsel for Respondent.

Dated: November 17, 1978.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 17th day of November, 1978, three copies of Respondent's Brief in Opposition to the Petition for Certiorari were mailed, postage prepaid, to John Hutter, Respondent, at the following address: Rt. 1, Sturgeon Bay, Wisconsin 54235; and 3526 N. Marshfield Avenue, Chicago, Illinois 60657.

.....

Robert C. Christenson